2015-1676

In The
United States Court of Appeals for the Federal Circuit

ANDRE WALKER,

Plaintiff – Appellant,

v.

HEALTH INTERNATIONAL CORPORATION, a Florida Corporation, HSN INC., a Delaware Corporation, HSN INTERACTIVE LLC, a Delaware Corporation,

Defendants – Appellees.

Appeal from the United States District Court for the District of Colorado in case no. 12-cv-03256, Judge William J. Martinez

CORRECTED

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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ARGUMENT

I. BACKGROUND

The conclusion that Appellant, Mr. Walker, engaged in vexatious litigation is not supported by the facts developed below. On May 6, 2014, the parties entered into a Mediated Settlement Agreement[1] that required payment of $200,000.00 to Mr. Walker and the execution of a "release" prior to the dismissal of the case. A26, ¶5. Plaintiff sought to file the MSA with the District Court, arguing that Colorado Local Rule D.C.COLO.LcivR 40.2(b) required the filing of the MSA with the District Court. Mr. Walker disagreed, explaining to the District Court that D.C.COLO.LcivR 40.2(b) only requires that the parties to *notify* the Court immediately "when the parties have agreed to settle or otherwise resolve a pending matter." Mr. Walker concerned that filing the MSA with the District Court would result in the loss of jurisdiction over the case before Appelles complied with *any* of the agreed-to conditions for dismissal of the case, and particularly the payment of the agreed-upon $200,000.00.

a. The Filings

In addition to filing the MSA with the District Court, Appellees began filing a barrage of motions. These motions are listed on the table below, above a table showing Mr. Walker's filings (tables show only independent party filings, not joint filings):

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[1] Titled "Mediated Settlement Agreement" (MSA), (A27-28,), which is still filed under seal as a restricted document with the District Court.

APPELLEE'S MOTIONS		
Stated Purpose of Appelles' Motion	Date Filed	Court Filing No.
Motion to stay.	May 9, 2014	140
Motion for leave to file MSA as a restricted document	May 12, 2014	144
Motion to extend deadlines	May 16, 2014	153
Motion to enforce MSA	May 29, 2014	163
Motion for sanctions under Rule 11	June 16, 2014	166

Mr. WALKER'S MOTIONS		
Motion for leave amend pleading	May 13, 2014	147
Motion to dismiss case	June 13, 2014	165

The number of filings show that if any of the parties engaged in vexatious activity, it was Appellees.

On June 16, 2014, Appellees filed a motion for sanctions under Fed. R. Civ. P. Rule 11 (A326-336), arguing that Mr. Walker's disagreement with Appelles' position that the MSA "resolves all claims asserted between the parties" was not true, as were Mr. Walker's statement that "are significant issues that remain to be resolved []which may require the filing of an amended complaint" and that Mr. Walker was "eager to keep this case moving forward", and were thus made in violation of Rule 11. Appellees followed up their motion for sanctions under Rule 11 with an improper allegation of compliance with Rule 11(c)(2). Mr. Walker pointed out that while Appellees alleged to the District Court that they were filing the same motion that was originally served on Mr. Walker, the motion was actually a different version of the motion, a version with one new exhibit, an altered exhibit, and new substantive arguments based on the newly added material.

b. Jurisdiction

In his opposition to Appellees' motion for sanctions Mr. Walker also explained his concern that the filing of the MSA with the District Court extinguished the "case or controversy" jurisdiction of the District Court, and cited *Kokkonen v. Guardian Life. Insurance Co. of America*, 511 U.S. 375, 380-81 (1994) in support for this position. (A341).

The District Court ignored Mr. Walker's explanation regarding jurisdiction, and his assertion that he did not want the case to be dismissed before Appellees complied with their obligation to pay him. (A341-342).

c. A settlement agreement which resolves all claims between the parties

In his opposition to Appellees motion to stay deadlines (Doc. 141, A379) , Mr. Walker notified the District Court that he disagreed with Appellees assertion that the parties had entered into an agreement that "resolves all claims asserted between the parties". (A379). Mr. Walker explained that there were several obstacles to be overcome the time statement was made. The first was the payment of the $200,000.00 to Mr. Walker. The second was the language of the release that was to be delivered by Mr. Walker, and a third issue was the language of the joint stipulation of dismissal of the case. Mr. Walker wanted the District Court to retain jurisdiction over the payments that are due to him over the next several years, while Appellees opposed the retention of jurisdiction.

Accordingly, Mr. Walker's May 10, 2014, representation that that there were "significant issues that remain to be resolved, and which may require the filing of an amended complaint" and that Mr. Walker was "eager to keep this case moving forward" was true. The statement, however, was unfairly categorized as being "disingenuous" when reviewed by the District Court nearly four months later, after all of the key conditions of the MSA had been met Appellees.

After its review of the MSA, the District Court announced that "[t]he Court has reviewed the [MSA] Agreement and finds that it is a settlement agreement which ***resolves all claims*** between the parties. Doc. #180 at p. 4, (A69) (emphasis added). Based on this conclusion, the District Court went on to conclude:

> [Mr. Walker's] actions have unnecessarily multiplied the proceedings at a time when the underlying claims have admittedly been resolved. These actions are not supported by any justifiable litigation strategy, particularly given Plaintiff's current position that the case should be dismissed. Plaintiff has wasted the time and resources of both this Court and the Parties. The Court finds that Plaintiff's vexatious actions fall within the enumerated exceptional circumstances permitting an award of attorneys' fees.
> (A 71).

Mr. Walker filed a timely request for reconsideration (A73-85) explaining to the District Court that Mr. Walker's opposition to the filing of the MSA with the District Court did not and could not have "forced" Appelles to file their misleading motion for sanctions under Rule 11, nor could have it caused or "forced" Appellants to oppose Mr. Walker's filing of his motion for leave to file an amended complaint. Mr. Walker also explained that it was the (vexatious) withholding of the Appellees payments that actually prompted Mr. Walker to file his motion for leave, filed just before scheduling order deadline. A party seeking leave to amend after the scheduling order deadline must demonstrate (1) good cause for seeking modification under Fed. R. Civ. P. 16(b)(4) and (2) satisfaction of the Rule 15(a) standard. *Pumpco, Inc. v. Schenker Int'l, Inc.*, 204 F.R.D. 667, 668 (D. Colo. 2001). Accordingly, since it was to Mr. Walker's best interest to file his motion for leave before the scheduling order deadline (under the more lenient Rule 15(a) standard), and since Mr. Walker anticipated that amendment to the pleadings would be advantageous if Appellees failed to fulfill their end of the MSA, or there was a rescission of the MSA and the case kept moving forward.

In his motion for reconsideration, Mr. Walker also explained that he had been advancing the case pursuant to the scheduling order because he had no idea that that Appellees had issued their payments promptly, and that it was with Appellees's counsel, who had been entrusted with the entire sum of the initial payment by as early as May 16, 2014, who had held up payment. Thus, it was Appellees' counsels' (vexatious) delay that prolonged the litigation. Doc. # 183(A75-77) .)

d. Striken Opposition To Fees

Within ten days of the District Court's denial (A86-89) of his motion to reconsider the District Court's grant of attorney fees (Doc. A73-85), Mr. Walker objected to Appellees' requested fees, and explained to the District Court that nearly all of Appellees requested compensation was related to their attorney's time spent prosecuting their motions for attorney's fees, and almost no time was spent on the motions filed by Mr. Walker. See 188 at page 7. (A78).

Still further, the District Court failed to hold a hearing on the issues of Mr. Walker's intent, as required by the Due Process clause of the Constitution. Accordingly, the District Court's conclusion as to Mr. Walker's intent is based on nothing more than speculation, which cannot be used to support such a finding.

II. STANDARD OF REVIEW

The grant of attorney's fees under the District Courts "inherent powers" is reviewed for an abuse of discretion. See *Chambers v. Nasco* 501 U.S. 32, 50-51 (1991)"We review a court's imposition of sanctions under its inherent power for abuse of discretion. … A court must, of course, exercise caution in invoking its inherent power, ***and it must comply with the mandates of due process***" in imposing an inherent-power sanction. (Emphasis added.)

The abuse of discretion standard requires that in reviewing the decision below, the appellate court "will not disturb the district court's ruling unless it is arbitrary, capricious, whimsical or manifestly unreasonable or when [the appellate court is] convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) (quotation omitted). "We will find an abuse of discretion when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings." *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1192 (10th Cir. 2015) (internal quotation marks omitted). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." *Id.* (internal quotation marks omitted).

III. REPLY TO COUNTER-STATEMENT OF THE ISSUES

Appellees contend that the issue here is whether the District Court properly exercised its equitable powers and awarded Appellees costs and attorneys' fees "based on Appellant's post-settlement vexatious actions." However, Appellees' statement ignores the District Court's failure to follow Due Process, assumes that Mr. Walker, engaged in vexatious litigation, a conclusion that is not supported by the facts as found by the District Court. The District Court ignored Mr. Walker's explanation that he did not want the case to be dismissed before Appellants complied with their obligation to pay Mr. Walker $200,000.00, as required by settlement agreement[2]. Thus, before reaching this Court must review the actions of Mr. Walker, whether Due Process was observed, and whether Mr. Walker's actions even met the definition of "vexatious". The District Court failed to observe Mr. Walker's rights under the Due Process clause, and as a consequence of this failure, the District Court's grant is not supported by evidence of intent, and fails to comply with the law as proscribed by *Chambers v. Nasco* 501 U.S. 32, 50-51 (1991)

IV. REPLY TO STATEMENT OF THE FACTS

This appeal relates to an award of attorneys' fees based on the fact that Mr. Walker opposed the filing of the Mediated Settlement agreement with the District Court, and opposed the stay of the case. Mr. Walker's reasons for not agreeing to the filing were primarily: i) that, contrary to Appelles' allegations, Local Rule D.C.COLO.LcivR 40.2(b) did not require the filing of the MSA, and only required notice of the parties' agreement to

[2] Titled Mediated Settlement Agreement (MSA), and later discussed in public document by Appellees and Distrisct Court, See Doc. #178 (A63-64.) and Doc. # 187 at p.3 (A 88).

settle; and ii) that the District Court would lose jurisdiction over the action long before Appelles complied with any of the terms of the MSA, and particularly before Appellees made a payment of $200,000.00 that was agreed to be paid before the dismissal of the suit. Accordingly, filing a "Notice of Settlement", along with the MSA, would have divested the District Court of Jurisdiction, causing dismissal of the case before Appellees had complied with any of their obligations under the MSA, leaving Mr. Walker with the option of trying to start another action in the event that Appellees did not comply with payments under the MSA.

The MSA does include require that parties will dismiss "all claims between them with prejudice," but only after the condition of payment of $200,000.00 to Mr. Walker. A27. Accordingly, the disagreement between he parties was not as to whether there was an agreement, but whether it was appropriate to file the agreement with the District Court before Appellees had paid pursuant to the MSA.

V. SUMMARY OF THE REPLY ARGUMENT

Appellees assert that the Settlement Agreement resolved all claims between the parties, and that it left nothing further for the parties to litigate in the case. Thus, based on Appellees own conclusions, the Settlement Agreement extinguished the "case or controversy" between the parties, leaving the District Court without Article III jurisdiciton jurisdiction. Under Article III of the United States Constitution, federal courts may adjudicate only actual, ongoing cases and controversies. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477(1990). The District Court lost jurisdiction upon Appellees filing of the MSA.

"[T]he federal courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them." *See In re Wolverine Radio Co., Michigan Employment Sec. Comm'n v. Wolverine Radio Co.*, 930 F.2d 1132, 1137 (6th Cir.1991). Consequently, courts have an independent obligation to examine their jurisdiction in every case, even when the issue of jurisdiction is not raised by any party. *See Lovell v. State Farm Mut. Auto. Ins. Co.,* 466 F.3d 893, 897 (10th Cir. 2006). If the court lacks subject matter jurisdiction, all rulings are a legal nullity, lacking any force or effect. See *Hart v. Terminex Int'l*, 336 F.3d 541, 542 (7th Cir. 2003).

Appellees' argument that the District Court had jurisdiction after Appellees' the filing of the MSA with the District Court is based on the premise that the MSA required that prior to dismissal, the parties had to agree to a joint stipulation of dismissal, but parties had yet to agree to and file a joint stipulation of dismissal at the time of filing of the MSA with the

District Court. Appellees' argument is misplaced. As discussed above, the parties cannot confer jurisdiction where none exists. The District Court held that the MSA "resolves 'all claims between' the parties". Doc#180, p.5, (A70), and thus the District Court no longer had jurisdiction after the MSA was filed.

The filing of the MSA necessarily destroyed the "case or controversy" jurisdictional requirement of Article III, §2 of the Constitution. That is, an "actual controversy" must exist not only "at the time the complaint is filed," but through "all stages" of the litigation. *Alvarez v. Smith*, 558 U. S. 87, 92 (2009) (internal quotation marks omitted); *Arizonans for Official English v. Arizona*, 520 U. S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed' " (quoting *Preiser v. Newkirk*, 422 U. S. 395, 401 (1975)).

VI. REPLY ARGUMENT

A. Standard of Review

This court reviews an award of attorney fees and costs under the abuse of discretion standard. See *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1530 (Fed. Cir. 1995). A district court abuses its discretion when it makes an error of law, or a clear error of judgment, or exercises its discretion on findings which are clearly erroneous. *Id.* (citations omitted).

B. No Authority To Grant Fees

A District Court may award attorneys' fees and costs in its discretion pursuant to its equitable powers when a litigant has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Ryan v. Hatfield*, 578 F.2d 275, 277 (10th Cir. 1978) (citing *Hall v. Cole*, 412 U.S. 1, 4-5 (1973)). The trial court has discretion and will be reversed only in circumstances which do not show a reasonable ground for the conclusion that Mr. Walker's actions were vexatious. Here, there are no reasonable grounds for supporting the conclusion that vexatiousness on part Mr. Walker existed. Mr. Walker filed just two motions: (1) a motion for leave to file an amended complaint, as allowed by the case scheduling order[3] and, (2) a motion to dismiss the case, filed as soon as the initial payment under the MSA cleared. The parties filed a joint motion to set a *Markman* hearing.

An award of attorney's fees under the bad faith exception to the American rule "is punitive, and the penalty can be imposed only in

[3] Which did not require a response from Appellees until after the date of the initial payment under the MSA was due, and thus would be of no effect unless Appellees failed to pay and comply with the MSA.

exceptional cases and for dominating reasons of justice." See *Cornwall v. Robinson,* 654 F.2d 685, 687 (10th Cir.1981) (emphasis added, citations omitted). Further, the "[i]nvocation of the bad faith exception to the normal federal rule that attorney's fees may not be recovered requires more than a showing of a weak or legally inadequate case." These considerations highlight the narrowness of the exception under which the trial court purported to award attorney's fees in this case. The exception is not invoked by findings of negligence, frivolity or improvidence. *Id.*

The District Courts' initial order finding that Mr. Walker's actions were "vexatious" is peppered with the word "vexatious", and points to its conclusion that the MSA "is a settlement agreement which resolves all claims between the parties" as support for the finding of post-settlement litigation on behalf of Mr. Walker as being "vexatious". Doc. 180 p.4 (A69).

Mr. Walker opposed a stay of the case to ensure that time was not lost if the terms of the agreement were met. This required no action by Appellees, other than identifying an agreeable date for a *Markman* hearing to be held long after the initial settlement payment was due. Nevertheless, the District Court (being fully aware of the fact that Mr. Walker opposed a stay of the case before receiving the payment required by the MSA[4])

[4] Doc. 180 p.1-2, A69-71.

concluded, based on Mr. Walker's mere opposition to stay[5], that he had "wasted the time and resources of both this Court and the Parties." *Id.* at p. 6.

Mr. Walker filed a request for reconsideration (Dkt. No. 183, A73-84) of this initial order finding his actions as being vexatious, and pointed out that it was Appellees that engaged in numerous unecessary filings (under the guise that Mr. Walker's opposition to the stay of the case before Appellees complied with any of their obligations under the MSA had "forced" them to file their improper motion for sanctions under Rule 11, and also forced them to file the MSA with the District Court, despite the fact that Colorado Local Rule D.C.COLO.LcivR 40.2(b) does not require the filing of the agreement, but merely requires a notice of existence of an agreement to settle. A180.)

In his request for reconsideration, Mr. Walker also pointed out that Federal Rule of Civil Procedure 41(a)(1)(A)(ii) provides that a "plaintiff may dismiss an action *without a court order* by filing: . . . a stipulation of dismissal signed by all parties who have appeared." (Emphasis added.) Mr. Walker also pointed out that "[*u*]*nless the notice or stipulation states otherwise*, the dismissal is without prejudice." Fed. R. Civ. P.

[5] As explained above, Mr. Walker only filed a motion for leave that did not require a response by Appellees, if Appellees paid as set forth in the MSA.

41(a)(1)(B). (Emphasis added in request for reconsideration.) While the MSA was not filed by the Plaintiff, the MSA clearly states that Plaintiff stipulates to the dismissal of the case with prejudice (once the initial payment and other contractual conditions were met). Mr. Walker further informed the District Court that in his opinion it is fair to say that this case was terminated with the filing of the Mediated Settlement Agreement on May 12, 2014. (ECF No. 145.) A voluntary dismissal by stipulation is effective immediately upon filing. *See* 8 Moore's Federal Practice, 41.34(6)(a) (Matthew Bender 3d ed.).

The conditions set forth in the MSA were a separate contract that, once the District Court lost jurisdiction, require separate grounds for jurisdiction before the District Court should decide their effect. As explained by the Supreme Court in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 378, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994):

> … we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree. Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.

Id. at 381-82.[6]

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[6] None of the conditions set forth in the MSA were due at the time of filing of the MSA with the District Court, and thus there was no case or

The District Court denied Mr. Walker's request for reconsideration, and in doing so the District Court explained its view on Mr. Walker's Rule 41 argument as follows:

> The Court has little difficulty rejecting Plaintiff's Rule 41 argument. Defendants filed the Agreement for the Court's review on May 12, 2014, because Plaintiff had opposed extending the deadlines in the Scheduling Order, arguing that "there are significant issues that remain to be resolved, and which may require the filing of an amended complaint." (ECF No. 141. [A379]) Plaintiff now argues that, because the Agreement contains language indicating that "by joint stipulation the parties to this agreement shall dismiss all claims between them with prejudice", the Agreement itself acts as a stipulation for dismissal that was automatically effective under Rule 41(a)(1)(A)(ii). (ECF No. 183 at 3, 10-11. [A74, A82-83]) However, on review of the Agreement, the Court notes that the language Plaintiff cites is preceded by a predicate condition:
> "Upon payment of the $200,000.00 plaintiff will deliver a release to [Defendants], and by joint stipulation the parties to this agreement shall dismiss all claims between them with prejudice." (ECF No. 145 at 1.) This sentence makes clear that the parties' joint stipulation was to be a separate filing that would follow the delivery of payment and a release, and thus the Agreement itself does not act as a stipulation for dismissal under Rule 41(a)(1)(A)(ii).

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controversy as to what it required. The issue of whether the MSA should have been filed was based on Appellees argument of Colorado Local Rule D.C.COLO.LcivR 40.2(b).

Accordingly the District Court appears to concede that Mr. Walker's position that the MSA left "significant issues that remain to be resolved" was accurate. The issues included agreement to the terms of the joint stipulation, the terms of the release, and of course the payment. However, it is also submitted that the District Court's conclusion that the MSA did not act as a stipulation of dismissal runs counter to the Tenth Circuit's decision in *De Leon v. Marcos*, 659 F.3d 1276, 1283-1284 (10th Cir. 2011), which explains that conditions in an agreement do not prevent it from acting as a stipulation for dismissal under Rule 41(a)(1)(A)(ii). See also *Anago Franchising, Inc. v. Shaz, LLC*, 677 F.3d 1272, 1277-78 (11th Cir. 2012)(collecting cases and citing *De Leon*.). As Mr. Walker explained in his request for reconsideration (A384-394 since the MSA, which is an agreement (stipulation) by all parties to dismiss the case, and which is self executing upon filing. Since the conditions set forth in the MSA are a separate contract that was not part of any order by the District Court prior to dismissal, they require separate grounds for jurisdiction before the District Court could properly decide their effect. However, the District Court lost jurisdiction on May 12, 2014, with Appellees filing of the MSA with the District Court.

i. Lingering Discovery Issue

Appellees never produced documents to support their sales. Mr. Walker agreed that a summary of sales figures would be enough for providing context to the mediation discussions, but Mr. Walker insisted that these were to be backed up with financial statements, as was required by Mr. Walker's discovery requests, which were served before the mediation. Appellees argue that '[I]f Appellant wanted Appellee's financial documents to verify the settlement amount, he should have requested them before executing the Settlement Agreement. However, Mr. Walker did request them before executing the Settlement Agreement, and that is why they remained a an unresolved discovery issue. The documents were needed to ensure that the MSA was not procured through a fraudulent summary of sales. Accordingly, since Mr. Walker expected documents that would either corroborate or negate the truthfulness of Appellees representations, his early assertion,"[w]hile theparties may have made significant progress during the mediation…there are significant issued that remain to be resolved" was undeniably true and correct. A330.

ii. The Motion For Leave

There are no findings or analysis as to what would or should have happened if Appellees would have turned over documents that would have revealed that MSA was based on a fraudulent summary of sales by Appelles, nor was there any discussion as to any of the amendments actually proposed by Mr. Walker's motion for leave. The District Court simply assumed that there could be no fraud, no mistake, no failure to pay, no failure to agree on the release[7] required by the MSA, and concluded that "was utterly unnecessary given the blanket language in the MSA that it would resolve all claims between the parties." A70-A71.

Still further, there is no merit to Appellees accusations that Mr. Walker somehow wanted to prolong the litigation. Mr. Walker had nothing to gain by prolonging the litigation. Mr. Walker simply wanted to confirm that the agreement was fair, based on the sales represented, and that Appellees paid as promised. It was Appellees counsel that withheld the payments entrusted with them, and it was Appellees counsel that failed to inform the District Court that they vexatiously withheld payment. Accordingly there is no record evidence sufficient to support a finding of vexatiousness on behalf of Mr. Walker.

Mr. Walker has repeatedly explained that wanted to keep the case moving forward in the event the MSA did not hold, and thus he did not want to stay the deadlines. Not staying the deadlines required much more action on Mr. Walker's behalf than Appellees. (Mr. Walker had to ensure that he met the deadline for amending pleadings and prepare, coordinate, and file the proposed *Markman* hearing schedule.)

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[7] The requirement of an additional release was an acknowledgement that the MSA by itself was not as comprehensive and iron-clad as asserted by the District Court.

iii. The Concealed Payments

Both Appellees had issued their payments on or before May 22, 2014 (one of the Appelles issued payment on May 16, 2014, and the other on May 22, 2014). Instead of notifying Mr. Walker of these payments, Appellees' counsel continued to lititgate their motions for attorney's fees and maintained that they were under no obligation to cooperate with Mr. Walker as to providing supporting financial documentation for their sales.

Finally, Appellees contend that the fact that their lawyers' concealment of their clients' payments entrusted with them is not relevant to this case. The argument is without merit. A court's "inherent powers" are steeped in the principles of equity. See *Chambers* 501 U.S. at 44. An important equitable maxim provides that "he who seeks equity must do equity." Concealing the payments perpetuated Mr. Walker's fear that Appellees would dishonor or challenge the validity of the MSA, and thus it was in Mr. Walker's best interest to keep the case on schedule.

As explained below and throughout this appeal, Appellees were not "forced" to do anything by Mr. Walker's opposition to the filing of the MSA with the District Court. The history of the case reveals that all they had to do is pay Mr. Walker the money promised in the MSA. "Vexatious delay of payment" is a well-recognized form of acts that evidence bad faith, which further the position that Appelles are not to be rewarded for their concealment or their vexatious delay of payment.

Appellees also argue that Appellees and their counsel were under no obligation to inform Mr. Walker when Appellee provided the payment to Appellee's counsel. Appelles' argument ignores Rule 1.3 of the Colorado Rules of Professional Conduct, which states that a lawyer shall act with reasonable diligence and promptness in representing a client. Comment 3 of this rule explains that Appellees' attorneys' withholding of the payment, and concealing of the payments, was in fact vexatious. Comment 3 states, "… [a] client's interests often can be adversely affected by the passage of time or the change of conditions; … . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

C. Appellant Is The "Prevailing Party,"

Mr. Walker is the "prevailing party." This Court has announced that to be the "prevailing party," requires: (1) that the party "received at least some relief on the merits," and (2) "[t]hat relief must materially alter the legal relationship between the parties by modifying one party's behavior in a way that 'directly benefits' the opposing party." See *Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed.Cir.2010) (citations omitted). Mr. Walker clearly meets both of these tests. The status is relevant in that it is rare to have attorney's fees granted to the losing party (which obviously spent a court's and the opposing parties time and resources on a losing case).

D. The District Court's "Striking" Of Appellant's Opposition to Attorneys' Fees

On May 14, 2015, Mr. Walker filed a statement, Doc. # 193. A175-177, where he explained that he interpreted the Court's "striking" of the Opposition (Doc. #188 (A384-394) is merely a complete denial of all issues, including the Constitutional due process objections, discussed therein after full consideration by the Court, and these issues have been preserved for appeal.

The Constitution requires Mr. Walker be given a hearing before a court can fairly conclude that he acted in subjective bad faiths, and is to pay his opponents' attorney's fees. Mr. Walker was not given this hearing, despite having brought the need for such a hearing to the District Court's attention. Accordingly, the District Court's award was without jurisdiction, and violated Mr. Walker's right to Due Process, guaranteed by the Constitution.

Thus, Appellees contest even a clear fact that Tenth Circuit has explained that "there is no provision in the Federal Rules of Civil Procedure for motions to strike motions and memoranda . . . ." *Searcy v. Soc. Sec. Admin.*, No. 91-4181, 1992 U.S. App. LEXIS 3805, at *5 (10th Cir. Mar. 2, 1992). Motions, briefs, memoranda, objections or affidavits may not be attacked by a motion to strike. 2 James W. Moore, et al., *Moore's Federal Practice* § 12.37[2].

Still further, Appelles argue that striking Mr. Walker's objection was late. However, the District Court awarded attorney's fees on August 4, 2014 (Doc. #180, A66-72). The order awarding attorney fees did not set a date for Mr. Walker to oppose Appellant's documentation (A70)Mr. Walker filed a timely request for reconsideration of the order awarding fees, Doc. #183, A73-85). Mr. Walker's request for reconsideration the order awarding attorney's fees was denied on February 6, 2015 (Doc. #187, (A86-89)). Mr. Walker then filed his opposition to the awarded fees on February 16, 2015 (ten days after the District Court denied his request for reconsideration). The District Court indicated that the time for Mr. Walker's opposition was indexed from the date of Appellees filing of their affidavit of fees, despite not providing a clear indication that this would mark the start of any time period to respond, and despite not stating a time period for response, and despite the grant of attorney's fees could have been altered by the District Court as a result of Mr. Walker's request for reconsideration. In other words, an objection to the fees would have been premature before a decision on the request for reconsideration.

E. The Settlement Agreement Is A Stipulated Dismissal

Appellant contends that the District Court lost jurisdiction when the Appellees argue that the MSA Agreement itself does not act as a stipulation for dismissal under Rule 41(a)(1)(A)(ii)." A115. Appellants argue that the cases cited by Mr. Walker (Appellant Br., p. 16) further support their position because separate stipulations for dismissal were filed by the parties in those cases. However, Appellees assertion actually supports Mr. Walker's position. Here we have a single document, signed by all parties, all agreeing to dismiss the action (albeit after certain conditions have occurred).

Circuits, such as the 10th Circuit, that follow a liberal view of Rule 41(a)(1)(ii) hold that, even in the absence of a written stipulation signed by the parties and filed with the court, an oral stipulation before the court is sufficient to meet the requirements of Rule 41(a)(1)(ii). See *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 279-80 n. 1 (5th Cir.1987) (voluntary joint oral stipulation to dismiss during trial sufficient to dismiss claims); *Eitel v. McCool*, 782 F.2d 1470, 1472 n. 3 (9th Cir.1986) (district court properly granted dismissal under 41(a)(1)(ii) after hearing oral argument during which both sides agreed to dismissal with prejudice); *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1199 (10th Cir.1974) (unqualified oral stipulation of dismissal in open court "constituted a voluntary dismissal of the complaint ..., even though no formal stipulation of dismissal was signed by all of the parties to the action as contemplated by Fed.R.Civ.P., Rule 41(a)").

Accordingly, if Appellees' filing of the MSA was not enough to effect a dismissal under Rule 41(a)(1)(ii), the parties clear agreement in open court during the July 2, 2014, status conference before Magistrate Judge Mix, clearly met the judicially recognized requirements of Rule 41(a)(1)(ii). See

Pipeliners Local Union No. 798. Id. (A60). There has been discussion that the parties still had to agree as to the terms of the dismissal (i.e., Mr. Walker wanted to ask the District Court to retain jurisdiction over the MSA), but Paragraph five of the MSA clearly states that the parties had agreed to a dismissal *with prejudice*.

Thus Appellees allegations that Mr. Walker "continued to resist dismissal because he 'contend[ed] that he is entitled to production of certain documents by [Appellees]'" are incorrect. He merely stated that he believed that he was entitled to those documents "prior to dismissal." Thus the record is clear, once the initial payment was made, Mr. Walker wanted the District Court to acknowledge that the case was dismissed, but wanted the District Court to retain jurisdiction over the MSA, if possible. A60.

F. Vacatur Is Appropriate

Appellees cease on a typographical error found on page 17 of Mr. Walker's opening brief, where he asserts that "the district court lacked Article III jurisdiction to decide the motions filed after August 12, 2014" to argue "[I]t is unclear what the relevance of that date is." However, Mr. Walker argues throughout his brief that the ***May 12, 2014*** filing of the MSA divested the District Court of subject matter jurisdiction. The District Court lost jurisdiction because of Appellees actions, and not because any action of Mr. Walker.

Appellees go on to argue that Mr. Walker's argument as to jurisdiction must fail because he stated on July 2, 2014 that the Court should retain jurisdiction, and continued to make filings in the District Court after May 12, 2014, while also arguing the Court lacked jurisdiction. A73, 107. Appellees' argument lacks merit. According to Appellee, Mr. Walker should not have opposed Appellees' May 12, 2014 filing of the MSA, which divested the District Court of jurisdiction improper Rule 11 motion, or defended against Appellees improper request for attorney's fees for activity that was not caused by Mr. Walker's opposition to the filing of the MSA with the District Court, when the District Court's rules only require notice of agreement to settle. Mr. Walker is entitled to zealously advocate his position, and his bargain, which was that neither party was to seek dismissal of the case until after he had received his initial payment of $200,000.00. The District Court lost jurisdiction over the underlying controversy due to Appellees filing of the MSA with the District Court. Mr. Walker vehemently opposed the filing due to the fact that the filing of the MSA would have the effect of dismissing the case under Rule 41(a)(1)(ii). Accordingly, the District Court's grant of attorney's fees was became moot as early as May

12, 2014, the day of the filing of the MSA with the District Court, and during the status conference of July 7, 2014, at the latest.

G. Appellees Request For Fees Related To This Appeal Must Be Denied

Appellees contend that are entitled to attorneys' fees for defending this appeal, and argue that "[t]his appeal is nothing more than a continuation of Appellant's vexatious actions, and is causing Appellees to incur further costs and attorneys' fees in upholding the costs and fees they were awarded in the District Court. However, they have not presented any legal authority that would support the conclusion that they are entitled to fees.

VI. CONCLUSION

For the reasons stated above, the Final Judgment (A105-106) must be vacated.

DATED: October 7, 2015

Respectfully submitted by,
_/s/ Ramon Pizarro____

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the body of this brief, beginning with the Jurisdictional Statement on page 1, and ending with the last line of the conclusion on page 29, including headings, footnotes, and quotations, is presented in Times New Roman 14-point font and contains 6036 words, in compliance with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

_/s/ Ramon Pizarro____
Ramon L. Pizarro (SBN 21400)

CERTIFICATE OF SERVICE

On the 7th day of October 2015, I filed the foregoing CORRECTED REPLY BRIEF FOR PLAINTIFF-APPELLANT electronically with the Clerk of Court via the Court's CM/ECF System. The following counsel of record were automatically served copies of said Brief by said CM/ECF System, via email:

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Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court, via Federal Express, within the time provided in the Court's rules.

October 7, 2015,

/s/ Ramon Pizarro____
Ramon L. Pizarro (SBN 21400)